SUN YENG & ANOR.

v.

INSPECTOR BOK BENG LEE & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
WAN HAMZAH J
[CRIMINAL APPLICATION NO. 2/1984]
31 MAY 1984

ADMINISTRATIVE LAW: *Habeas corpus - Detention order by Minister under Internal Security Act - Extension of - Arrested for the offence of having under their control firearm and ammunition - Detention order cancelled - Acquitted and discharged on the withdrawal of charges - Rearrested and detained - Application for a writ of habeas corpus - Whether detention mala fide and not on the authority of a valid or legal power - Whether detainees still posed a threat to the security of the country.*

Hen Chean Seng (Hen) and his wife Tham Wai Yen (Tham) were detained by separate detention orders made by Menteri Hal Ehwal Dalam Negeri on 23 February 1979 under s. 8(1) of the Internal Security Act 1960 (the Act), with a view to preventing them from acting in any manner prejudicial to the security of Malaysia. The period of two years' detention was extended by the orders of the Minister dated 9 February 1981.

On 12 August 1981 both Hen and Tham were jointly charged with two offences, of having under their control a firearm and ammunition in contravention of s. 57(1)(a) & (b) of the Act. Both offences are punishable with death. Pending trial they were remanded in prison. However on 21 September 1981 the Minister ordered cancellation of the detention orders against Hen and Tham. On 10 May 1984 Hen and Tham were acquitted and discharged when the prosecution withdrew the charges against them. On the day when they were discharged, both Hen and Tham were re-arrested outside the Court under s. 73(1) of the Act and now are under detention.

The applicants, who are mothers of both Hen and Tham, have applied for the issue of a writ of *habeas corpus* challenging the detention of Hen and Tham.

In the application five grounds were given, alleging that the detention is *mala fide* and not on the authority of a valid or legal power.

In an affidavit filed on behalf of the respondents, it was alleged, both Hen and Tham, still posed a threat to the security of the country, because of their past deep involvement and strong pro-communist ideological stand. Therefore, unless and until they have been properly rehabilitated and decommunised, their release would definitely pose a serious security threat.

Held:

[1] It was clear from the affidavits that the re-arrest had been done on the initiative of the Special Branch. There was nothing to show that re-arrest was done by order of the Minister.

[2] It was accepted that Hen and Than still pose a threat to the security of the country, which justified their further detention.

[3] The re-arrest and detention of Hen and Tham, have been done *bona fide* and in accordance with s. 73 (1) of the Act.

[4] If there is undue delay on the part of the Special Branch to apply to the Minister for fresh orders of detention, the applicants may make fresh application to the Court.

[Application dismissed.]

Legislation referred to:
Internal Security Act 1960, ss. 8(1), 57(1)(a), (b), 73(1), (3), 81(3).

For the applicants - Karpal Singh; M/s. Karpal Singh & Co.
For the respondents - Mokhtar bin Abdullah; SFC

JUDGMENT

Wan Hamzah J:

Hen Chean Seng (hereafter referred to as Hen) was arrested on 26 December 1978, and his wife, Tham Wai Yen (hereafter referred to as Tham) was arrested on 27 December 1978. They were detained by separate orders of detention made by Menteri Hal Ehwal Dalam Negeri on 23 February 1979 under s. 8(1) of the Internal Security Act 1960, with a view to preventing them from acting in any manner prejudicial to the security of Malaysia. The place of detention prescribed in the orders was Jalan Bandar Police Station. The period of two years' detention was extended by orders made by the Minister dated 9 February 1981, and the place of detention was changed to No. 514, Jalan Clifford, Kuala Lumpur.

On 27 June 1981 Tham gave birth to a male baby who was named Hen Chean Shei.

On 12 August 1981 both Hen and Tham were jointly charged in the Court with two offences, one of having under their control a firearm in contravention of s. 57(1)(a) of the Act, and the other of having under their control ammunition in contravention of s. 57(1)(b) of the Act. Both offences are punishable with death. As the result of the charges they were remanded in prison pending trial, pursuant to the provisions of the Criminal Procedure Code.

On 21 September 1981 the Minister made cancellation orders under s. 81(3) of the Act to cancel the detention orders against Hen and Tham.

On 10 May 1984 Hen and Tham were acquitted and discharged in the High Court at Kuala Lumpur when the prosecution withdrew the charges against them.

On the same day, immediately after being discharged both Hen and Tham were arrested outside of the High Court under s. 73(1) of the Act and are now under detention at Jalan Bandar Police Station under s. 73(3).

On 11 May 1984 Inspector Kamaruddin bin M. Yaakub signed an authorisation under s. 73(3) authorising further detention of Hen and Tham for an additional period of 24 hours.

On 12 May 1984 Deputy Superintendent of Police Cheah Kee Chuan signed authorisation under s. 73(3)(b) authorising further detention of Hen and Tham for an additional period of 28 days until 8 June 1984.

The first applicant is the mother of Hen and the second applicant is the mother of Tham. By this notice of motion the applicants apply for the issue of a writ of *habeas corpus* challenging the detention of Hen and Tham on the following grounds:

(a) The first respondent cannot possibly have any justifiable reason to believe that there are grounds which would justify the detention of Hen and Tham under s. 8 of the Internal Security Act as their detention orders have been annulled. Further during their detention they could not possibly have acted in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

b) The re-arrest and detention of Hen and Tham after their long and protracted detention is *mala fide* and not on the authority of a valid or legal power.

(c) The very withdrawal of charges against Hen and Tham and concession that the discharge should amount to acquittal by the learned Deputy Public Prosecutor shows the learned Attorney-General's consent to prosecute issued under s. 80 of the Internal Security Act was ill-conceived and the continued detention of Hen and Tham has not been on the authority of a valid power. The detention and prosecution of Hen and Tham has been *mala fide.* The learned Attorney-General obviously did not properly or at all apply his mind before putting pen to paper when authorising the prosecution.

(d) Hen Chean Shei, the child conceived and born during the detention of Hen and Tham during their initial detention and custody, has been bereft of parental love and affection since it has after birth been in the custody of Hen's parents. The continued detention of Hen and Tham is, therefore, clearly improper. The Special Branch must take responsibility for Hen and Tham being allowed to cohabit in a Special Branch lock-up during their detention resulting in the conception and birth of their son Hen Chean Shei. Therefore the release of Hen and Tham is necessary to provide parental love and affection to the child.

(e) Having regard to the facts and circumstances, there has been want of *bona fides* as well as non-application of mind on the part of the first respondent in effecting the arrest and detention of Hen and Tham on 10 May 1984.

At the hearing of this application the Senior Federal Counsel submitted to the effect that the present detention is intended to be continuation of the previous detention prior to the cancellation orders for the same reasons and facts which supported the previous detention. It was submitted by him that the Minister issued the cancellation orders not because he believed that Hen and Tham had ceased to be a threat to the security of Malaysia but because of technicality in that as the result of the charges preferred against Hen and Tham they had to be remanded in prison which was not the place of detention prescribed in the orders of detention. In my opinion it is not proper to cancel very important and serious orders of detention for such mere technical reason. The Minister could have issued fresh orders to change the place of detention to the prison. In any case there is no affidavit of the Minister produced stating the reason for making the cancellation orders.

There is nothing in the two affidavits of Superintendent Foong Yee Kai filed in this case in opposition to the application, to show that the re-arrest of Hen and Tham was done by order of the Minister. It is clear from those affidavits that the re-arrest had been done on the initiative of the Special Branch. In his affidavit dated 17 May 1984, Superintendent Foong Yee Kai stated *inter alia* as follows:

> In furtherance to para. 4 and 5 of my affidavit (dated 14 May 1984), I wish to confirm that I am the officer in charge of the Special Branch investigation into the case involving Hen and Tham. I have considered the period of detention of the detainees between the dates of their initial arrest in 1978 and the date of their acquittal and discharge on 10 May 1984. Although the detainees were denied physical contact with the communist underground organisation during that period of detention, they still posed a threat to the security of the country or any part thereof because of their past deep involvement and strong pro-communist ideological stand. During that period of detention the detainees had not undergone proper rehabilitation to decommunise them for the following reasons:

(a) during the period from their initial arrest (26 and 27 February 1979) to 30 September 1981 when they were under Special Branch custody, no attempt at rehabilitation could be carried out pending completion of criminal investigation against them for unlawful possession of firearms and ammunitions under s. 57(1)(a) and (b) of the Internal Security Act;

(b) during the period of their remand in prison, no rehabiliation could also be carried as they were under the jurisdiction of the prison authorities.

Therefore, unless and until they have been properly rehabilitated and decommunised their release at this juncture would definitely pose a serious security threat.

I also crave leave to refer to the allegations of fact or statements under s. 11(2)(b) of the Internal Security Act annexed to my Affidavit (Produced therein and marked as 'E' and 'F'). Before their arrest, both detainees were ranking members of the Malayan Communist Youth League (MCYL) 101 Branch operating in Wilayah Persekutuan and Selangor. This is a very dangerous Communist Party of Malaya (CPM) underground Organisation with extensive links with the Communist Terrorist Organisation (CTO) operating in the Betong Salient, South Thailand, in North Selangor and in Pahang. This MCYL 101 Branch is still very active and its elements are still carrying out subversive activities in support of the CPM cause. Therefore, the Special Branch and I have reasons to believe that these grounds would justify their further detention under s. 8 of the Internal Security Act. On these grounds, I accordingly instructed Inspector Bok Beng Lee, the first respondent, to re-arrest the detainees with a view to apply to the Minister of Home Affairs for orders of detention under s. 8 of the Internal Security Act.

I affirm that the re-arrest and detention of the detainees are *bona fide* exercise of legal and valid powers under s. 73(1) and (3) of the Internal Security.

I find that the Special Branch earnestly believe that Hen and Tham still pose a threat to the security of the country for the reasons stated by Superintendent Foong Yee Kai above. I accept the fact that the Special Branch reasonably believe that the grounds stated by Superintendent Foong Yee Kai above would justify their further detention under s. 8 of the Act. I also accept the fact that the Special Branch would apply to the Minister for fresh orders of detention under s. 8 of the Act. Section 73(1) of the Act reads as follows:-

Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe-

(a) that there are grounds which would justify his detention under s. 8; and

(b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

I therefore find that the re-arrest and detention of Hen and Tham have been done *bona fide* and in accordance with s. 73(1) of the Act. There is nothing in the Act which prevents the police to take action again under s. 73(1) under the above circumstances. Therefore this application is dismissed.

It seems that there is not much further enquiry which the Special Branch has to carry out since they intend to proceed on the basis of the same facts on which the previous detention orders were obtained. Therefore there should not be any delay on the part of the Special Branch to apply to the Minister for fresh orders of detention. If there is undue delay on the part of the Special Branch to apply to the Minister or undue delay on the part of the Minister to decide on the application, the applicants may make a fresh application to the Court. Even if the Minister decides to issue further orders of detention, it would still be open to the

applicants to make a fresh application to the Court if there is some evidence to show that the Minister had previously found Hen and Tham had ceased to pose a threat to the security of Malaysia and there is no fresh evidence to support new orders of detention.

In considering whether to issue further orders of detention the Minister will, no doubt, take into consideration the fact that the child has been deprived of parental love and affection if this fact is brought up to the attention of the Minister.

Also found at [1984] 1 CLJ 384